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IN THE

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The American Bar Association (ABA) is the leading national membership organization for the legal profession with more than 400,000 members across the United States.[1] "The

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[1]In accordance with Rule 37 of the rules of this Court, *amicus curiae* the American Bar Association hereby certifies that this brief is filed with the

purposes of the Association are to uphold and defend the Constitution of the United States, . . . [and] to apply the knowledge and experience of the profession to the promotion of the public good." American Bar Ass'n, *ABA Constitution and Bylaws: Rules of Procedure*, House of Delegates, Art. 1, § 1.2 (1994-95).

This case implicates the ABA's long-held concern for the well-being of children and families living in poverty. The ABA has expressed this concern by creating the Center on Children and the Law, the Steering Committee on the Unmet Legal Needs of Children, and the Commission on Homelessness and Poverty. In recent years, the ABA has produced two reports on the difficulties facing children, including American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and their Families, *America's Children at Risk, A National Agenda for Legal Action* (July 1993) [hereinafter *"Children at Risk"*], its "landmark" report on the unmet legal needs of children. *See also* American Bar Ass'n Steering Comm. on the Unmet Legal Needs of Children, *The Impact of Domestic Violence on Children* (1994). Among other recommendations, that report called for "[t]he organized bar [to] seek improvements in the AFDC program . . . and [to] work to defeat any proposed

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consent of both parties to this action. *Amicus* also certifies that no counsel for a party authored this brief in whole or part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

changes that penalize recipients." *Children at Risk, supra*, at 12.

The ABA also has expressed specific concern about durational residency requirements. In part as a result of its view that "[t]he express purpose of discriminating against newcomers is constitutionally impermissible," *id.* at 5, and its understanding that "benefit levels are tailored to the cost of living in [each] jurisdiction, and . . . no benefits in any state in the nation are sufficiently generous to lift a family above the poverty line," *id.* at 4, the House of Delegates resolved "[t]hat the American Bar Association opposes linking public assistance for needy persons to requirements which infringe on the right of privacy and on other individual freedoms, such as the right to travel." *Children at Risk, supra*, at 87. The Association believes that its experience with these issues will allow it to make a substantial contribution to the Court's consideration of this case.

STATEMENT

This case involves a constitutional challenge to California Welfare and Institutions Code § 11450.03, which limits the level of welfare benefits available to new California residents during their first year in the State. During that first year, the statute limits cash benefits to the level provided by the state from which an individual has moved. As a result, many new residents would receive benefits that are only a fraction of those paid to other Californians in comparable financial circumstances. This is true despite the fact that the cost of living in California is among the highest of any state.

Respondents Brenda Roe and Anna Doe are two recently arrived residents of California who were threatened with

feeling the effects of the California statute. Roe moved to California with her husband who could not leave her side and therefore could not work because she developed complications with her pregnancy. She was informed that her grant level would be reduced from $565 per month to the Oklahoma level of $307. Pet'r App. 19. Doe moved to California while pregnant, obtained a job but was forced to quit because it was too stressful, and applied for welfare benefits. She was informed her benefits would be reduced from $456 per month to the District of Columbia level of $330. Pet'r App. 19-20.

Respondents brought suit in federal court, and the court preliminarily enjoined implementation of section 11450.03. The Ninth Circuit affirmed.

SUMMARY OF ARGUMENT

1. Under this Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), it is well established that strict constitutional scrutiny is required when states draw distinctions among their own residents based on duration of residency, at least where those distinctions affect the ability of new residents to exercise fundamental rights or to receive the basic necessities of life. In each of those cases, the Court compared the treatment accorded to new and old residents of the same state, and found no sufficient justification for invidious distinctions between those groups. In particular, it rejected the argument that durational residency requirements were justified to prevent needy persons in other states from having an undue incentive to move into the defendant state or to make it more palatable politically to maintain overall benefit levels at a higher level.

More recently, in *Zobel v. Williams*, 457 U.S. 55 (1982), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court did not need to reach the question whether strict scrutiny was applicable to laws that also drew distinctions based on duration of residency in the state but affected less substantial rights and interests. It invalidated those laws under rational basis scrutiny, holding that there is no legitimate interest in rewarding long-term state residents for their past contributions to the state.

Applying this "right to travel" case law here, it is clear that strict scrutiny applies to California's law drastically limiting welfare benefits available to some new state residents. Moreover, because the State's defense of the statute adds little to the arguments previously rejected, that statute plainly should be held invalid. In particular, the notion that California's treatment of new residents is properly compared, for constitutional purposes, to the treatment they would have received in their former states reflects a fundamental misunderstanding of this Court's jurisprudence.

2. The fact that Congress, after the enactment of the California law, purported to authorize states to limit the welfare benefits provided to residents during their first year in the state is constitutionally irrelevant. Any federal interests that may be served by such a limitation would not change the level of constitutional scrutiny properly accorded to California's statute. Indeed, it is clear that Congress lacks the power to authorize states to enact laws that would otherwise violate the "right to travel."

In any event, close examination of the supposed federal interests enunciated in the brief of the United States as *amicus*

curiae reveals that they are entitled to little weight. In the main, they amount to new ways of saying that there is a legitimate interest in limiting benefits to new state residents because of fear that a given state will become a "welfare magnet." This Court has already firmly rejected that notion, and it fares no better in a new federal form. Other than that, the United States offers only vague suggestions that laws like the one at issue here serve as valid "choice of law" provisions. Whatever this may mean, it hardly serves to overcome the constitutional problems raised when states draw distinctions among their own residents, based on duration of residency, in the distribution of benefits needed for the basic necessities of life.

ARGUMENT

California's restriction of welfare benefits for new residents clearly violates the Constitution. Under California Welfare & Institutions Code § 11450.03, one class of needy Californians would be denied equal access to basic necessities of life made available to other needy Californians, solely because the first class has exercised its right to travel and taken up residency in the state within the previous twelve months. Clearly established law mandates that the state have a compelling justification for such discrimination. Rather than offer such a justification, California attempts to distinguish its case from prior cases, arguing that legislation that discriminates against new state residents need only be rationally related to a legitimate state interest to be constitutionally permissible where the state's treatment is equivalent to what the individuals would have received in their former home states. This approach fundamentally misconceives the concerns that have animated

this Court's "right to travel" decisions.[2] Moreover, the fact that Congress, in welfare reform legislation passed subsequent to the enactment of the California statute here at issue, purported to authorize differential treatment of welfare applicants during their initial twelve-month period of residence in a state alters neither the applicable standard of review nor the substantive outcome of this case.

I. THIS COURT'S DECISIONS REQUIRE INVALIDATION OF THE CALIFORNIA LAW.

A. The *Shapiro* Doctrine.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), and its progeny -- *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) -- this Court established that laws selectively denying fundamental rights or critical benefits to persons who have recently exercised their right to move from one state to another must be narrowly tailored to promote a compelling state interest. The same strict scrutiny is properly applied to the statute at issue here. Moreover, under that standard -- indeed, even under rational basis scrutiny -- California's limitation of welfare assistance for new residents should plainly be held invalid.

The three state laws challenged in *Shapiro* barred all welfare payments to new residents for one year, thus creating

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[2]Petitioners' rationale is no more compelling today than it was in 1994, when this court dismissed as unripe a case involving a constitutional challenge to the identical California statute. Amicus American Bar Association respectfully refers this Court to its brief in that case, *Anderson v. Green*, No. 94-197, *cert. granted*, 513 U.S. 922 (1994), *dismissed as unripe*, 513 U.S. 557 (1995).

"two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction." 394 U.S. at 627.[3] Recognizing that the restriction would severely impact interstate migration by indigents, a constitutionally protected right, the Court required the state to show a compelling state interest.[4] Reasoning that a state may not set out to deter the exercise of a constitutional right, the court declared the asserted purpose of "deterring the in-migration of indigents" to be "constitutionally impermissible." *Id.* at 631. It also rejected as illegitimate any state attempt to "fence out those indigents who seek higher welfare benefits," *id.*, or to categorize citizens, in the distribution of public benefits, on the basis of "contributions" previously made to the state, *see id.* at 632. Finally, although accepting the legitimacy of fiscal concerns as a general matter, the Court held that "saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 633.[5]

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[3]The Connecticut statute invalidated in *Shapiro* was in one key respect *narrower* than the California statute here at issue, as it contained exceptions permitting new residents to receive benefits immediately if they met certain criteria indicating that they had not established residency in the state for the purpose of obtaining public assistance. *See Shapiro*, 394 U.S. at 622 n.2.

[4]*See also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (plurality opinion) ("[W]here a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.") (citing other authorities).

[5]*See also Maricopa County*, 415 U.S. at 263 ("appellees must do more than show that denying free medical care to new residents saves money").

Applying the rationale of *Shapiro*, the Court subsequently invalidated laws that barred new residents from voting (*Dunn v. Blumstein*) and from receiving free nonemergency medical care for indigents (*Maricopa County*). As in *Shapiro* itself, the Court reached its conclusion in these cases after finding the treatment of new residents to be inferior to the treatment of otherwise identical long-term residents *of the same state*. In *Maricopa County*, for example, the Court, in concluding that the plaintiff was immediately entitled to the full benefit of the free medical care available to similarly situated long-term residents of his new Arizona county of residence, did not even discuss whether the plaintiff's former home state of New Mexico offered *any* medical care.[6] Rather, the Court compared new and old residents' rights, holding that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Maricopa County*, 415 U.S. at 261.

Since *Maricopa County*, the Court has not considered a case involving discrimination against new residents with respect to basic necessities or fundamental rights. However, in cases involving discrimination with respect to less important benefits, the Court has continued to insist that there is no legitimate interest in favoring long-term residents *per se*, and has therefore invalidated the laws at issue in these cases as failing to survive even rational-basis scrutiny. *See Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating an Alaska statute which distributed cash dividends from development of the state's natural resources based on length of residence); *Hooper*

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[6] Petitioners' assertion that the plaintiff did enjoy such a right in his former state, Pet'r Br. at 6, finds no support in any of the published opinions in that case.

v. Bernalillo County Assessor, 472 U.S. 612 (1985) (rejecting exemption from property tax that applied only to Vietnam veterans who were state residents before 1976); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (overturning civil service preference awarded only to veterans who were New York residents when they entered the armed forces).[7]

This Court's precedents thus clearly indicate that a state may not, without very good justification, differentiate among its own residents based on the fact that some of them have recently exercised their right to travel. Where such discrimination affects a person's fundamental rights or basic needs (the deprivation of which has long been recognized to threaten severe hardship, even in the short term[8]), the state must

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[7]In *Zobel v. Williams*, 457 U.S. 55 (1982), for example, the Court held that the State of Alaska's justification for its scheme of distributing dividends from the exploitation of the state's natural resources -- in amounts that varied based on length of residency in the state -- failed rational basis review, thus not requiring the court to determine whether stricter scrutiny would have been warranted. *Id.* at 63. The Court noted that the rationale of rewarding contributions to the state made by residents in the past would be impossible to cabin to the context of cash dividends, "open[ing] the door to state apportionment of other rights, benefits, and services according to length of residency,"and "permit[ting] the states to divide citizens into expanding numbers of permanent classes." *Id.* at 64.

[8]*See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (suspension of welfare benefits "pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits"); *Mathews v. Eldridge*, 424 U.S. 319, 340-343 (1976) (finding hardship from temporary cessation of disability benefits to be less severe than that in *Goldberg* as eligibility was not based on need; court assumed that other need-based assistance would be available). Indeed, California's own courts have recognized that the gravity of the hardship that loss of welfare benefits can cause necessitates special consideration, noting that

supply a compelling justification for providing them on a basis that differentiates among classes of citizens distinguishable only by the length of their bona fide residency in the state.

B. The California Statute Is Clearly Invalid Under the Existing Precedent.

There can be little doubt that the California statute falls squarely within the category of legislation requiring strict scrutiny under the existing case law. Like the statute in *Shapiro*, California Welfare & Institutions Code § 11450.03 creates two classes of needy citizens in California, identical in all respects except the duration of their residency. The only difference is that, here, the disfavored group is not entirely denied benefits; it is instead given lower benefits that in many instances would be grossly insufficient to match the cost of living in California.

Moreover, nothing offered as a justification by the state suggests that its law could survive constitutional scrutiny. The legislative goals that California claims to be pursuing are, at bottom, indistinguishable from those rejected as insufficient justifications in the *Shapiro* line of cases. Thus, although California describes its purposes as "reducing state expenditures and aiding in welfare reform," Pet'r Br. at 26, it admits a desire to avoid becoming a "welfare magnet," *id.* at 8 -- a goal no different from the desire to discourage indigent persons from migrating to the new state in search of better welfare benefits that the *Shapiro* court found to be constitutionally impermissible.

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residency requirements for welfare benefits "could cause great suffering and even loss of life." *Kirk v. Board of Regents*, 273 Cal. App. 2d 430, 440 (1969), *quoted in Maricopa County*, 415 U.S. at 260 n.15.

Certainly, California's reference to saving money on welfare cannot save a statute that relies on an invidious classification to effectuate that purpose. But here, that is precisely what the state is arguing. It attempts to divorce the cost justification from the goal of discouraging migration, but that effort rings hollow because there is no indication that new California residents are more likely than old to require welfare assistance at all, or in greater amounts, or to be better suited to subsist on a reduced amount of assistance than longer-established residents, and the total cost savings achieved by subjecting them to a one-year disability could be achieved by a unilateral reduction of welfare benefits to all participants of less than one dollar per month. *See* Pet'r App. 31 & n.20; Br. in Opp'n at 8. Thus, the main cost savings effected by the statute (if any) would come, not directly through reduction in certain residents' benefits, but indirectly through successful persuasion of economically vulnerable persons in other states not to move to California in the first place.

Under the case law, a law that divides classes of state residents based on duration of residency cannot survive so much as rational basis review, let alone the higher burden of compelling justification required for a statute that implicates the constitutional right to travel. *See Hooper v. Bernalillo County Assessor*, 472 U.S. at 623 ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.")

In *Shapiro, Dunn*, and *Maricopa County*, the Court described the flaw in the laws there invalidated by stating that

the restrictions "penalize" or "impinge" the right to travel. *See, e.g., Shapiro*, 394 U.S. at 634 ("penalize"); *id.* at 638 ("touches on"); *id.* at 644 (Stewart, J., concurring) ("impinge"); *Dunn*, 405 U.S. at 339 ("penalize"); *Maricopa County*, 415 U.S. at 256 ("penalized"); *id.* at 262 n.21 ("impinge"); *id.* at 269 ("impinge"). California now argues that "penalty" analysis necessitates a comparison between the benefits received by a person before and after moving to California. But that conception of "penalty" was flatly rejected in *Dunn*, where the Court indicated that a comparison of a single individual's rights in two different states did *not* implicate the right to travel, so long as his treatment was comparable to that of his new neighbors. *See Dunn*, 403 U.S. at 342 n.12 ("Where . . . an interstate migrant loses his driver's license because the new State has a higher age requirement, . . . the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents old and new, must be of a prescribed age to drive.") Indeed, petitioners themselves declare that "[d]ifferences between states, even though at times major, do not penalize the right to travel." Pet'r Br. at 20-21. Rather, it is differences *within a state* in the treatment of persons identical in all relevant respects except for duration of state residency that "penalize" some persons for having exercised their right to travel and thus are highly suspect under the Constitution.

Thus, California's penalty argument relies on a confusion between two distinct evils caused by a state's differential treatment of its own citizens on the basis of the duration of their residency. One possible evil is actual deterrence of interstate travel. *See Maricopa County*, 415 U.S. at 256-57; *Dunn*, 405 U.S. at 339; *Shapiro*, 394 U.S. at 629. The other is discrimination affecting persons who have *already* exercised their right to travel, as compared to those who have not, *within*

and by the state creating this distinction. Maricopa County, 415 U.S. at 256-57; *Dunn*, 405 U.S. at 339-40.[9] In many cases, probably including this one, the constitutional injury comes predominantly not from deterrence but from discrimination. Petitioners' misapprehension of this distinction is apparent in their argument that "existing California residents are, by definition, not impacted by section 11450.03 since any decision to travel to California has already been made," Pet'r Br. at 24. In reality, *only* California residents are governed by section 11450.03; the State has no jurisdiction over people, indigent or not, who reside in other states. And California acts with regard to all of its residents in the area of welfare; the salient question is how it treats those who have exercised their right to travel within the last twelve months as opposed to those who have been established for a year or more.

In *Dunn*, furthermore, the Court emphasized that strict scrutiny review was compelled by either of two independent

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[9]This dual aspect of the right to travel has been affirmed in the cases in which the Court found it unnecessary to apply more than rational basis review to invalidate a state enactment. In *Soto-Lopez*, where the plurality in fact did apply strict scrutiny, the Court reaffirmed that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'" *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations omitted). It found that a state statute granting civil service preferences only to veterans who had been New York residents at the time of their enlistment in the armed forces did inflict such a penalty. *See also Zobel*, 457 U.S. at 60 n.6 ("In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis.")

factors: "the basis for the classification (recent interstate travel)" *or* "the benefit withheld by the classification" – in that case, "the opportunity to vote." 405 U.S. at 335. As demonstrated above, the California statute classifies welfare-eligible residents on the basis of recent interstate travel, and for that reason alone must be subject to strict scrutiny under the *Shapiro* line of cases. But the nature of the benefit affected here also strengthens the conclusion that a compelling justification must be made. Like the statute in *Shapiro* itself, the California welfare restriction affects the opportunity to obtain basic necessities of life. The State has chosen to adopt a benefits formula keyed to the cost of living, *see* Cal. Welfare & Inst. Code § 11452. Moreover, substantial empirical evidence, including the specific facts regarding the named plaintiffs in this action, indicates that differentials in cost of living among states will place recent migrants to California receiving the lower cash benefits of their former home states at a substantial disadvantage in comparison to long-term California residents who are on welfare, and in absolute terms, will likely result in homelessness and other very concrete human costs. *See* Pet'r App. 21-24 (describing evidence adduced); Br. in Opp'n at 8-9. Even though the Court has not attempted to define all of the parameters of the "penalty" analysis, in *Maricopa County*, it reaffirmed that providing basic necessities of life to a state's citizens on unequal terms determined solely by reference to duration of residency was such an unjustifiable penalty. *Maricopa County*, 415 U.S., at 259. This case falls squarely within that holding.[10]

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[10]In practical application, the California law is even more odious than a residency requirement creating a dual set of laws, applying differently to old citizens and new. By purporting to apply to a new resident a part of the law of his former home, it creates not a dual standard, but a multi tiered one, as the variations in benefits available under other states' laws will mean that new residents are not even comparably positioned with respect

Petitioners nevertheless argue that welfare is not itself a constitutional right, placing heavy reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970). But the lack of a constitutional right to welfare has no relevance to the constitutional analysis in this case.[11] In fact, the rationale on which the United States and California both rely to justify the law -- the need to secure a state against the possibility of becoming a welfare magnet by some means that will not encourage a "race to the bottom" in the provision of benefits -- would make absolutely no sense if there were a direct constitutional right to welfare benefits, as the states would be constitutionally prohibited from undercutting this right, regardless of whether the criterion chosen to differentiate among recipients impinged an independent constitutional right. Of all of the Court's right to travel cases, only in *Dunn* did the residency requirements abridge a constitutional right separate from the right to travel and equal protection; leaving welfare aside, the fact that states were clearly not obligated to provide special veterans benefits,

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to one another.

[11]California does not deny that the plaintiffs are generally eligible for welfare under its own statutory welfare scheme, see Pet'r Br. at 20, a scheme that the legislature has designed to ensure minimal subsistence to its residents, using a baseline for calculation of relief determined in relation to the standard of living. See Cal. Welfare & Inst. Code § 11452. Having made this legislative judgment, it cannot apply a different formulation to the relief offered to one class of needy citizens because they have recently exercised their right to interstate travel. *Dandridge* itself recognizes that any classification by the state in the provision of welfare benefits "may not, of course, impose a regime of invidious discrimination," 397 U.S. at 483. *Shapiro* indicated that to draw a line based on the date of establishing residency in a state is to practice invidious discrimination. *See Shapiro v. Thompson*, 394 U.S. at 633. Hence, it is clear why, as in *Maricopa County*, the California law must be subject to strict scrutiny. *See Maricopa County*, 415 U.S. at 262 n. 21 (distinguishing *Dandridge*).

as in *Hooper* and *Soto-Lopez*, or direct cash dividends, as in *Zobel*, did not save those laws from invalidation where the state, having determined to provide such a benefit to its citizens, attempted to do so on a differential basis to classes distinguished solely by relation to the timing of the citizen's association with the state. California offers no reason why basing its money-saving measures on the length of a recipient's citizenship in the state is any less irrational than the measures invalidated in any of these cases.

The foregoing analysis demonstrates not only that California's law cannot withstand the strict scrutiny that is properly applied to laws restricting access to basic necessities for persons who have exercised their right to interstate travel, but also that the California law cannot pass even rational basis review. Hence this Court should sustain the District Court's preliminary injunction.

II. THE FACT THAT CONGRESS HAS AUTHORIZED STATES TO INSTITUTE DIFFERENTIAL TREATMENT ON THE BASIS OF DURATION OF RESIDENCY IS CONSTITUTIONALLY IRRELEVANT.

There is no reason to alter the Court's approach to this case based on the fact that Congress has purported to authorize laws like the one at issue here. Under 42 U.S.C. § 604(c), a part of the package of welfare reforms passed by Congress in 1996, states are authorized to "apply to a family the rules (including benefits amounts)" applicable in the family's former state of residence during the family's first twelve months of residency in a new state. As a result, the United States urges this Court to evaluate the law under different criteria. In so doing, however, the United States acknowledges that important

constitutional rights are implicated by the California statute and that the law must therefore be subjected to a review more searching than rational basis -- *i.e.*, "intermediate" scrutiny. U.S. Br. at 10. Indeed, the federal government does not seek to overturn *Shapiro, id.* at 9, 22, and does not express confidence in the validity of the specific California statute here in issue, *id.* at 8 (advocating sustaining preliminary injunction); *id.* at 10 (expressing doubt about statute's validity given its enactment prior to federal authorization and "its apparent overbreadth in relation to the relevant federal purposes"). Given these concessions, it is apparent that the enactment of the federal statute, allegedly "authorizing" California's pre-existing statute, alters neither the applicable standard of review nor the substantive outcome of this case.

A. No Potential Federal Interest Should Affect the Applicable Standard of Review.

The government's argument for departing from the established constitutional framework and applying intermediate scrutiny here is murky. The United States explains that "[t]he premise for applying that test here is that Congress has specifically authorized a general type of state classification, and we think it clear that the goals of the congressional authorization . . . are important ones. Thus, if the state statute implements the federal authorization, then the dispositive question will be whether the particular form of implementation selected by California is 'substantially related' to those federal purposes." U.S. Br. at 10.

But regardless of the assumed strength of the federal interests motivating the passage of 42 U.S.C. § 604(c), it is impossible to describe the California law here challenged as being created to "implement" the federal enactment, as it was

passed four years prior to Congress's actions. The United States itself acknowledges this awkwardness. U.S. Br. at 10. For this reason alone, it is wholly inappropriate to alter the standards of review applicable to this particular statute.

In any event, the United States' argument regarding the standard of review also has more fundamental flaws. First, to the extent that the United States suggests that the government's *interest* determines the *standard* of constitutional review, it clearly gets the analysis backwards. Where the rights of the individual under the Constitution are at issue, the standard of review is dictated by the implicated right and the disputed law's impact on it[12] -- not by the justifications offered.

Indeed, the United States at times acknowledges that the federal government may not itself abridge personal constitutional rights including the rights to travel and equal protection, as embodied in the Fifth Amendment. U.S. Br. at 9, 24; *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding that equal protection analysis under Fifth Amendment is same as under Fourteenth Amendment); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 n.7 (1993) ("the individual right of interstate travel" may not be "eliminated by Congress"); *Shapiro*, 394 U.S. at 641-42 (invalidating on Fifth Amendment grounds District of Columbia statute imposing durational residency requirements). It also disclaims the notion that Congress may authorize the states to accomplish indirectly what Congress is itself

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[12]Indeed, if the standard of review were determined by looking first at the government's interest, it is unclear whether this rule would work for or against the government. One might argue that weak state interests should be subjected only to rational basis review, or that weak interests would properly invoke courts' skepticism, and hence strict scrutiny.

constitutionally prohibited from doing. U.S. Br. at 9; *see Shapiro*, 394 U.S. at 641 ("Congress may not authorize the States to violate the Equal Protection Clause."); *cf. Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring) (the free migration of United States citizens from one state to another "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal," which is subject to congressional regulation under the Commerce Clause).

Instead, the United States seeks to enunciate several *federal* interests that it then attempts to use to buttress the potential constitutionality of *state* laws limiting welfare benefits for new residents. But this Court already rejected such a convoluted constitutional analysis in *Shapiro*. There, assuming that the challenged state statutes were authorized, but not mandated, by the federal welfare statute, the Court held it "is therefore not that statute but only the state requirements which pose the constitutional question." 394 U.S. at 641. The *Shapiro* Court went on to state that if the federal statute itself were "somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional." 394 U.S. at 641; *see also id.* at 641-42 (invalidating District of Columbia statute under Fifth Amendment).

In any event, as we make clear in the next section, the federal interests asserted by the United States, even assuming they are relevant to the issues before this Court, do not substantially affect the constitutional problems raised by the California statute.

B. The Asserted Federal Interests Do Not Alter the Calculus Here.

The United States asserts that because of the national scope of the interests of Congress, the purposes it attributes to the federal enactment "are plainly legitimate, even though it may be doubted that an individual State, pursuing only its own interest, would ever have valid reasons for distinguishing new citizens from old in allocating benefits under a program designed and funded solely by the State." U.S. Br. at 20. The federal purposes that the United States posits are (1) "avoiding the creation, through a federal program, of distorted incentives for interstate migration for benefit recipients"; (2) "addressing the unique choice-of-law considerations that may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules"; and (3) "mitigating any tendency, in such a program, toward a 'race to the bottom' in the State-by-State establishment of benefit levels." *Id.* These suggested interests, when examined carefully, amount to less than might at first appear.

The first of these asserted interests, "avoiding the creation . . . of distorted incentives for interstate migration," *id.*, is simply another way of stating the "welfare magnet" argument. The government suggests that states should be permitted to discourage indigent persons from migrating into a state for the purpose of availing themselves of that state's welfare benefits. But this motive was squarely rejected in *Shapiro*. *See* 394 U.S. at 631-32. Making this interest a supposedly national one does not legitimize it. In our federal system, states always provide different types and levels of taxes and benefits, which may be, indeed often are, a consideration in a citizen's decision to

relocate; indeed, diversity among the states has been lauded as "mak[ing] government more responsive by putting States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Justice Brennan explained in his concurrence in *Zobel*:

> a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. . . . That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a large framework, and it is fully -- indeed, necessarily -- consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

457 U.S. at 67-68 (Brennan, J. concurring). *See also id.* at 76-77 (O'Connor, J., concurring in judgment); *Shapiro*, 394 U.S. at 632; *Maricopa County*, 415 U.S. at 264. If the United States is correct that avoiding "distorted" incentives for interstate migration justifies the institution of durational residency requirements, Congress may by simple enactment destroy the careful balance between state diversity and equality among national citizens on which the federal system rests: A congressional determination that the decision to move in pursuit of better schools, lower taxes, or any other government service indicates "distorted" incentives would permit states to limit or deny these benefits to their new citizens, placing state

citizenship above national.[13] This outcome is inconsistent not only with the right to travel, but the very fabric of our union.

The United States' third-stated interest is intimately related to the first, and is just as illegitimate.[14] The United States posits that Congress authorized the States to impose durational residency limitations on welfare benefits in order to give the States assurance that they had a mechanism to offset their attractiveness as "welfare magnets" if they introduced innovative practices, thereby reducing the tendency for states to "race to the bottom" out of fear of attracting indigent persons. Although Congress's intent, under this theory, is benevolent, it cannot save the individual state laws establishing these differential requirements on the basis of residency. Essentially this same argument was rejected in *Maricopa County*:

> It is suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence

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[13]This Court has previously affirmed that reasoning applicable to welfare benefits would also apply to other governmental programs. *See Shapiro*, 394 U.S. at 632-33 (rejecting rationale for durational residency requirement for welfare, as it "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection").

[14]In fact, this interest might simply be a restatement of the interest in preventing the creation of "welfare magnets," in which case it is illegitimate for the reasons stated above. The following discussion is based on the understanding that the United States intends a subtly different interest -- not a direct interest in preventing states from in fact becoming welfare magnets, but rather an interest in preventing states from diminishing their services to avoid this threat, whether real or perceived.

> the requirement is necessary for public support of that medical facility. A State may not employ an invidious discrimination to sustain the political viability of its programs. As we observed in *Shapiro*, "[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme.

415 U.S. at 266-67 (citations omitted).

The point made in *Maricopa* is one manifestation of the broader principle that government may not validate private prejudices, even if its own motives are to shield the disadvantaged from the effects of that prejudice. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (reversing state court decision altering child custody because of concern that child would suffer from prejudice due to custodial mother's remarriage to person of a different race) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") Congress may not validate the States' fears of attracting the indigent by offering them the option of defending against this perceived threat by discriminating against a class of citizens on the basis of the duration of their residency, even if Congress does so to combat the perceived risk that the states will otherwise homogenize their programs so as to reduce the purported attractions. To the contrary, if Congress wishes to ensure that States provide at least minimal care for their indigent residents, it must do so in ways that will not implicate equal protection and the right to

travel, such as by establishing minimum benefit requirements.[15] *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (purpose of discouraging alcohol "strength wars" did not justify restriction on truthful labeling of alcohol content of beers, as Congress could accomplish same end by regulations not implicating constitutional rights, such as direct regulation of alcohol content).

Finally, although the United States repeatedly refers to the Congressional authorization in 42 U.S.C. § 604(c) as a "choice of law" rule, it does not elaborate on what it means by this or why such a rule is required, let alone constitutionally justified, other than to allude vaguely to "unique . . . considerations" that may "reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules." U.S. Br. at 20. Whatever overall principle the United States may intend to indicate by this mysterious "choice of law" notion, it is clearly inappropriate to attribute this purpose to the law passed by the state of California, which did not suggest such a purpose in adopting the law and has not subsequently attempted to ratify it.

Nor could California convincingly do so, for several reasons. First, the notion of a conflict of laws necessitating special "choice" provisions could become germane only in situations where individuals are potentially eligible for welfare assistance from two states at the same time. But the California law is not limited in its impact to persons who previously had been receiving any sort of public assistance in their prior state. *See* Pet'r App. 18 (quoting implementation instructions for §

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[15]Such requirements need not hamper creative efforts in the states, as "minimum" standards can be defined in a variety of ways.

11450.03, issued to counties by the California Department of Social Services, which state that in applying restriction, "it does not matter if a family was on aid in the former state."). Nor does it, by its very nature, serve to separate out a class of persons properly assisted by states other than California. The statute merely adjusts the benefits provided to two classes of *California* residents.

Indeed, it would be fatuous to suggest that there is a substantial choice of law problem in the welfare field. Where a person leaves one state, and becomes subject to the laws of a new state, there is generally no conflict regarding the law governing his current conduct.[16] Nor is there any doubt about which state is properly responsible to provide any assistance that the person may need, up to the level the state deems appropriate for all of its residents. That is all the plaintiffs in this case have asked California to do.

In sum, the federal interests suggested by the United States add little to the constitutional analysis in this case. That stark reality, combined with the United States' frank concessions that the California law requires some form of searching scrutiny and appears "overbroad," should serve to reinforce the conclusion that the courts below acted fully appropriately in enjoining the implementation of section 11450.03.

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[16]Because California has agreed to pay respondents benefits as California residents -- albeit at a lower level -- it cannot and does not rely on the argument that its law serves to verify residency in the state. *Cf. Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) (law terminating benefits 30 days after recipients leave the country justified based on the likelihood that recipient no longer a bona fide U.S. resident).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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